THAM SAW FONG & ANOR.

v.

TEH TENG SENG REALTY SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-326-89]
4 AUGUST 1990

CONTRACT: *Sale and purchase agreement - Loan agreement - Guarantee - Privity of contract.*

In this case, TJT had purchased from the defendant a house in June 1982 and the parties agreed that vacant possession be given within 18 months, on or before 21 December 1983. In order to complete the purchase, a loan was obtained from the Development & Commercial Bank (the bank). The plaintiffs, as directors of TJT, were required to guarantee the repayment of the loan. The plaintiffs alleged that vacant possession had not been given on the due date as stipulated in the agreement and as a result thereof TJT could not continue with the repayment of the loan. Due to TJT's default, the bank had demanded payment of RM328,946.91 from the plaintiffs and judgment was duly obtained against them.

The plaintiffs brought this action to recover from the defendant the money claimed by the bank. The defendant applied to set aside the plaintiffs' statement of claim.

Held:

[1] The plaintiffs' claim is devoid of any basis; they were not parties to the sale and purchase agreement of the house and therefore they had no right to make this claim against the defendant.

[2] In any case, the defendant had tendered the certificate of fitness before the 18 months had expired; that being so, there was no breach by the defendant.

[3] The bank had the right to claim from the borrower and the plaintiffs (as guarantors) because of the default in repayment; furthermore, the judgment obtained by the bank had not been disputed because the plaintiffs had withdrawn their application to set aside the said judgment.

[Defendant's application allowed. Plaintiffs' statement of claim set aside.]

Cases referred to:

Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah [1979] 2 MLJ 240
Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. [1914-15] All ER 333

For the plaintiffs - Choy Kam Lee; M/s. K.C. Lai & Co.
For the defendant - Leow Seng Nyap; M/s. S.N. Leow & Co.

JUDGMENT

Abdul Malek Ahmad J:

In their statement of claim, both the plaintiffs had stated that they were the guarantors for the loan relating to the purchase of a two and a half storeyed house on land HS (D) Ka 4421/81 Lot No. PT 36642 Plot 12 (hereinafter "the said property") taken by the

purchaser Toyong Jaya Trading Sdn. Bhd. (hereinafter "TJTSB"), from the Development and Commercial Bank (hereinafter "the said bank"). The sale and purchase agreement had been entered on 22 June 1982 between TJTSB and the defendant and vacant possession had been fixed at eighteen months thereafter that is on 21 December 1983. To obtain the loan, the defendant had recommended to the plaintiffs the said bank whereupon the plaintiffs as directors of TJTSB were required to sign.

According to the plaintiffs, vacant possession had not been given on 21 December 1983 by the defendant and without the said property, TJTSB could not continue with the payments to the said bank. In consequence, the said bank had taken action on the said property and claimed from the plaintiffs as guarantors money amounting to RM328,946.91 sen *vide* Ipoh High Court Civil Suit 23-314-87 (hereinafter "the relevant case"). As such, the plaintiffs were now claiming back from the defendant the money claimed by the said bank.

Based on the plaintiffs' statement of claim only without taking into consideration the submissions of both parties in the defendant's application to strike out the said statement of claim, which is the very matter which the Court is now required to adjudicate upon, it is clear that any order which may be given as regards the plaintiffs' statement of claim would mean that the defendant, namely the vendor, would be required to pay back to the said bank the loan taken by TJTSB namely the purchaser, and guaranteed by the plaintiffs. This by itself would not give any meaning from the aspect of logic and common sense.

After hearing the submissions from both learned Counsel, my view was that the plaintiffs' claim was as regards the sale and purchase agreement between TJTSB and the defendant and because the plaintiffs are not parties to the said agreement, they have no right to make this claim. Further, the certificate of fitness for occupation for the said property dated 6 June 1983 had been tendered and this was before the eighteen month period, which is stated in the agreement, expired. As such, there was no evidence to show that any breach had occurred.

In the relevant case, the said bank had the right to claim from the borrower and guarantors as the loan had not been paid. The judgment obtained by them had also not been disputed as the guarantors namely the plaintiffs had withdrawn their application to set aside the said judgment. The Court held that if there was any dispute as regards the sale and purchase agreement between TJTSB and the defendant, any claim should have been made by one of them and not by some other party including the guarantors to TJTSB.

In *Yeng Hing Enterprise Sdn. Bhd. v. Liow Su Fah* [1979] 2 MLJ 240, where the respondent had claimed money from the appellant company and the first defendant, the Federal Court had decided that the appellant company is not a party to any transaction between the respondent and the first defendant and the source of the money payment had no connection with the appellant company. The situation and facts of the said case can be said to be on all fours with this case. The same opinion was also given in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1914-15] All ER 333.

On these factors, my opinion was that the defendant's application to set aside the plaintiffs' statement of claim must be allowed with costs as the plaintiffs are not parties to the sale and purchase agreement and have no right to make a claim on it.

Also found at [1990] 2 CLJ 860